



NEPA Modernization (CE)  
Attn: Associate Director for NEPA Oversight  
722 Jackson Place NW  
Washington, DC 20503

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To Whom It May Concern:

Thank you for the opportunity to provide input on the Council on Environmental Quality's (CEQ's) proposed Guidance on Categorical Exclusions. For over thirty years, the Idaho Conservation League (ICL) has worked to protect the clean water, wilderness and quality of life in Idaho. We have been involved with NEPA issues throughout the state for decades. As Idaho's largest state-based conservation organization we represent over 9,000 members, many of whom have a deep personal interest in protecting our water, wildlands, and wildlife from the effects of development and other decisions which impact Idaho's quality of life.

The Idaho Conservation League has also been closely involved in the implementation of Categorical Exclusions, especially on public lands in Idaho. We have been troubled with the inconsistent implementation of CE projects across different agencies and management areas in Idaho.

Specifically, different agencies conduct varying levels of public involvement in developing and implementing CE projects, have different public notification processes and conduct varying levels of environmental analysis related to CE projects. This creates a problem for our organization in tracking these projects and providing meaningful and substantive comments to governmental agencies that may assist in evaluating the impacts of proposed activities.

For instance, the Bureau of Land Management does not provide any public involvement in the development or implementation of CE projects. No public scoping is conducted and no legal notification (i.e. in newspapers) is provided. Therefore the only way to learn about categorically excluded projects is once the decision has been made. We fail to see how this complies with requirements of NEPA to involve the public to the extent practicable.

FOIA requests for project level implementation also reveal that analyses conducted by different agencies reveal vast disparities in the rigor of their analysis. Some agencies

conduct extensive effects analysis on the impacts of proposals, while others simply check-off an Extraordinary Circumstances worksheet to document their determination.

The result of these differences is that CEs are applied in different ways, in different areas and with differing levels of public involvement and notification. The CEQ should provide clear direction to agencies to ensure that CE projects are conducted in a consistent manner across agencies and land management units.

Categorical exclusions should not be used to shut the ears and eyes of federal agencies. They should not become a mechanism to exclude citizens from participating in agency actions. We offer the following recommendations to simplify the use of categorical exclusions.

### **Categorical Exclusions Should be Reserved for Non-controversial Actions**

The clearest guidance that CEQ can give agencies is to say where things are black and white. Congress did not provide for categorical exclusions in NEPA. NEPA's mandate is to investigate impacts "to the fullest extent possible." 42 U.S.C. § 4332. CEs can save public time and agency resources when limited to administrative actions, which by their nature do not effect the environment.

Problems have arisen when agencies attempt to extend the use of CEs from administrative actions to actions – such as logging or drilling – which often do have significant environmental impacts. When there are questions about whether an action's impacts are significant, the public deserves the opportunity to be part of the process of evaluating potential impacts.

CEQ's guidance should include an explicit presumption that an environmental assessment (EA) or environmental impact statement (EIS) is required. A categorical exclusion should be an exception reserved for situations where no controversy over the proposed action exists. The goal of NEPA is to inform government decisions and to give those affected by them a say in the decisions. CEQ was created by NEPA. 42 U.S.C. § 4342. It is CEQ's responsibility "to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation." 42 U.S.C. § 4344(4). CEQ should add language to its guidance articulating the benefits of conducting analysis required by NEPA.

CEQ's guidance should encourage agencies to use simple and straight-forward EAs rather than try to squeeze a controversial action into a CE. Agencies can reduce controversy and litigation by limiting the use of categorical exclusions to circumstances where no one has anything to say and no information to provide. CEs should not be used to shut the eyes and close the ears of government decision-makers.

In particular, we propose adding the following language to the end of the first paragraph in Section II of the proposed guidance: "A Federal agency, however, should not seek to use a categorical exclusion where a specific action is controversial. Trying to do so can

generate anger in the public the agency serves and can result in the expenditure of more resources than proceeding with a simple environmental assessment.”

### **Public Record and Involvement Should be Mandatory**

CEQ’s guidance should require a public process for creating a new CE and for applying a CE once it is established. In order to create a new CE, an agency must first identify it as part of the agency’s procedures to implement NEPA. 40 C.F.R. § 1507.3(b)(2)(ii). Changing such procedures to add new CEs require public notice in the Federal Register and the opportunity to comment. 40 C.F.R. § 1507.3(a). In order to make this public input meaningful, an agency must provide the public the record that supports the proposed categorical exclusion. Rather than simply encouraging agencies to provide this information, CEQ’s guidance should provide that agencies “must” make information supporting the categorical exclusion available to the public. (See Section IV).

The public should not have to depend on Freedom of Information Act (FOIA) requests to obtain information supporting the establishment of a new categorical exclusion. This is a waste of time and energy for both the public and the agency involved. The requirement in CEQ’s regulations to involve the public prior to changing an agency’s NEPA procedures by creating a new categorical exclusion is rendered rather meaningless if the agency does not provide the public the basis on which the proposed change is being made.

Furthermore, CEQ’s guidance should require that an agency provide notice and an opportunity to comment to the public prior to applying an established CE to a specific action. As part of the public process in applying a CE, CEQ’s guidance should instruct agencies to prepare a record of decision to justify the use of a categorical exclusion. Without such notice and the opportunity to comment, the public has no way of evaluating and enhancing the agency’s decision. CEs should not become a mechanism for excluding the public the agencies serve. Providing notice and the opportunity to comment on a proposal to use a CE is a simple and quick way to determine if there are parties interested in the action’s action. Such notice and comment can also alert an agency to the presence of extraordinary circumstances making the use of a CE unlawful. See, e.g., *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004). If there is no concern about the action, the agency can proceed quickly ahead without additional analysis. If, however, there is concern, the agency is better off proceeding with a simple Environmental Assessment rather than facing public opposition and potential litigation. Specifically, the guidance should be changed in Section IV.B, to require Federal agencies to involve the public, rather than simply “encourage” them to do so.

Whether to create or apply a categorical exclusion is not an agency’s decision alone. Both actions are subject to judicial review under the Administrative Procedure Act (APA). See, e.g., *Heartwood, Inc. v. U.S. Forest Service*, 73 F.Supp.2d 962, 975-76 (S.D. Ill. 1999) (“the [Forest Service] must explain its decision adequately so that the Court can determine that it was not arbitrary. In doing so, the Court may not rely merely on the agency’s expertise.”)(citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989)); *High Sierra Hikers Ass’n*, 390 F.3d at 641. Documentation for both creating and applying a CE is necessary to demonstrate to a court that an agency’s action is not

arbitrary and capricious. 5 U.S.C. § 706(2)(a). See also, *California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002) (“It is difficult for a reviewing court to determine if the application of an exclusion is arbitrary and capricious where there is no contemporaneous documentation to show that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision.”); *Wilderness Watch and Public Employees for Environmental Responsibility v. Mainella*, 375 F.3d 1085, 1095 (11th Cir. 2004) (struck down use of CE to permit vans to transport tourist through wilderness areas to access historical site); *Center For Food Safety v. Johanns*, \_\_\_ F.Supp.2d \_\_\_, 2006 WL 2568023 (D.Hawaii Sept. 1, 2006) (struck down use of CE for open air testing of genetically engineered plants). CEQ’s guidance should explicitly require such documentation and mandate that it be made available to the public prior to the agency action.

### **Potential Cumulative Impacts Must be Explicitly Addressed in Record of Decision**

The guidance should discuss the issue of cumulative impacts. CEQ’s regulations define a “categorical exclusion” as “a category of actions which do not individually or cumulatively have a significant effect on the human environment . . . .” 40 C.F.R. § 1508.4 (emphasis added). An agency’s decision document justifying the use of a CE should explicitly address other foreseeable actions in the area. For example, Forest Service regulations require such analysis in the scoping that occurs for all proposed projects even those which are categorically excluded. 40 C.F.R. §1508.25(a)(3) (the responsible Forest Service officer must consider “similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography”). CEQ’s guidance should explicitly require all agencies to record in a decision document such analysis of potential cumulative impacts when using a CE. Without such analysis, an agency’s use of a CE is vulnerable to legal challenge. See *Colorado Wild v. U.S. Forest Service*, 435 F.3d 1204, 1221 (10th Cir. 2006).

### **Conclusion**

The way to simplify the use of categorical exclusions is to limit their use to actions that not controversial. Where an agency chooses to use a categorical exclusion it should document its rationale for doing so, including the absence of extraordinary circumstances. In order to provide a meaningful role for the public, an agency should provide this documentation in time for the public to comment on it before the agency acts.

Sincerely,

/s/Jonathan Oppenheimer

Jonathan Oppenheimer  
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